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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 832

MEHMET SABAHITTIN GIZ,
Petitioner

v.

HERBERT BROWNELL, JR.,
Attorney General of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Regulations	3, 15
Statement of Facts	3
Reasons for Granting the Writ	6
Conclusion	14
Appendix A	15
Appendix B	18

CITATIONS

Cases:

Adler v. *Board of Education*, 342 U.S. 485 (1952)	12
Benzian v. *Godwin*, 168 F. 2d 952 (C.A. 2, 1948), cert. denied 335 U.S. 886	9
DiGirolamo v. *Acheson*, 101 F. Supp. 380 (Dist. of Col., 1951)	7
Ex Parte Ghosh, 58 F. Supp. 851 (S.D. Calif. 1944), appeal dismissed, 148 F. 2d 822	11
Gay v. *Brownell*, 120 F. Supp. 319 (D.C. Puerto Rico, 1954)	7
Heiner v. Donnan, 285 U.S. 312 (1931)	12
Hong v. *Acheson*, 110 F. Supp. 60 (N.D. Calif. 1953)	7
In re Bevelacqua, 295 Fed. 862 (D.C. Mass. 1924)	13
In re Siem, 284 Fed. 868, affirmed 299 Fed. 582 (C.A. 9, 1924)	13
Machado v. *McGrath*, 89 U.S. App. D.C. 70, 193 F. 2d 706 (1951) cert. denied, 342 U.S. 948	8
Manley v. *Georgia*, 279 U.S. 1 (1928)	12
Matter of Josefsson, File No. 4558054, Immigration and Naturalization Service	13
McGrath v. *Kristensen*, 340 U.S. 162 (1950)	8, 10
Mobile, Jackson & Kansas City Railroad Co. v. *Turnipseed*, 219 U.S. 35 (1910)	12
Moser v. *United States*, 341 U.S. 41 (1951)	6
Petition of Ajlouny, 77 F. Supp. 327 (E.D. Mich. 1948)	13

Page

Rueff v. *Brownell*, 116 F. Supp. 298 (D.C.N.J. 1953) 7
Schlesinger v. *Wisconsin*, 270 U.S. 230 (1925) 12
Staten Island Hygenia Ice and Cold Storage Co. v. *United States*, 85 F. 2d 68 (C.A. 2, 1936) 7
Strockstrom v. *Commissioner*, 190 F. 2d 283 (C.A. D.C. 1951) 7
Uyeno v. *Acheson*, 96 F. Supp. 510 (W. D. Wash. 1951) 7

Statutes and Regulations:

Selective Training and Service Act of 1940 15
Section 303(a), 50 U.S.C. App. 303(a) 15
32 Code of Federal Regulations 15
611.12 15
611.13 15
611.21 17
611.21-1 17
611.22 17
611.29(b) 18

Miscellaneous:

Problems of Selective Service (1952) 8, 9, 17
Appendices A-C, pp. 35, 36, 37, 40 9, 17
Text, pp. 106, 107, 125, 128-129 8, 10
39 Op. Atty. Gen. 504 10

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v.

HERBERT BROWNELL, JR.,

Attorney General of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming by a divided vote the judgment of the District Court for the District of Columbia declaring petitioner ineligible for citizenship.

Opinions Below

The opinion of the District Court is unreported and is set forth at page 28 of the record. The opinion of the Court of Appeals is not yet reported and is set forth at page 42 of the record.

Jurisdiction

The judgment of the Court of Appeals was entered on December 13, 1956. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether petitioner, a citizen of Turkey is permanently barred from American citizenship under the Selective Training and Service Act of 1940 and therefore ineligible for preexamination or suspension of deportation by reason of his claim for draft exemption filed on December 31, 1942 where it appears:

   (a) That he was recognized as a temporary visitor and a student at the time by the Immigration and Naturalization Service;

   (b) That he applied to the Selective Service System for a certificate of nonresidence in 1944 and such application was denied on the merits;

   (c) That his draft board acknowledged in writing that such draft exemption claim was filed by mistake and at the suggestion of the chief clerk of the board;

   (d) That petitioner subsequently sought to enter the armed forces of the United States but was rejected because of alienage.

2. Whether petitioner was a nonresident on December 31, 1942 and as such not subject to the Selective Training and Service Act of 1940 (50 App. U.S.C. 303a).

3. Whether petitioner's status as a resident was taken as confessed where it appears that he filed an application for a certificate of nonresidence and the same was denied on its merits by the Selective Service System.

4. Whether petitioner claimed draft exemption under mistake where it is undisputed that he made such claim at the suggestion of his draft board which now acknowledges that an error was made.

5. Whether petitioner's subsequent efforts to enter the armed forces of the United States which were unsuccessful because of his alienage, removed the citizenship bar.

Statutes and Regulations

The pertinent statutes and regulations are set forth in Appendix A to this petition.

Statement of Facts

Petitioner is a native and citizen of Turkey, is married to an American citizen, and is the father of an American born child. He came to the United States lawfully as a student on September 9, 1939, and as Exhibit 12 in his Immigration File reveals, a fact admitted by the pleadings, he remained in a lawful student status until July 21, 1945 (R. 4, 7, 9).

Petitioner has been directed to leave the United States and has been denied permission to remain here through relief known as preexamination or suspension of deportation upon the ground that he is ineligible for American citizenship because he claimed draft exemption as a neutral alien (R. 39).

Petitioner claimed draft exemption as a neutral alien on December 31, 1942 (R. 10). Exhibit 4 in the Immigration File is a letter from the Chairman of the local draft board addressed to the State Director, pointing out that the petitioner claimed draft exemption by mistake at the request of the then Chief Clerk of the Draft Board. The Chairman of the Draft Board states in this letter (R. 41):

> "In reviewing this file at the registrant's request, we note that DSS Form 301 (request for exemption as a neutral) was filed by Mr. Giz on December 31, 1942 at the request of the then chief clerk, Mrs. Dora Roberts. It is our best judgment that he should not have been permitted to do this inasmuch as he was not vulnerable at that time for a 1-A classification or induction by

this board. He is desirous of enlisting and serving in the armed forces of the United States but cannot do so because of his citizenship. . . .

"This board therefore recommends that the registrant be permitted to withdraw the DSS Form 301 from his file."[1]

In his deportation proceeding instituted in 1947 (R. 5), the petitioner testified without contradiction as follows (R. 35, 37):

Q. When you signed this Form DSS 301, did you sign it for the purpose of avoiding military service or for some other reason?

A. Not for avoiding military service. The purpose in my mind was at that time my studies were so heavy I could not take time to go from San Francisco to Berkeley to arrange procedure and, so I thought signing this form would not keep me absent from my studies.

* * * * *

A. I did not ask for the application. The application was presented to me.

* * * * *

Q. Did you undersand at that time that the execution of that form debarred you forever from becoming a citizen of the United States?

A. No.

The Immigration File also reveals that thereafter Turkey became a belligerent on February 25, 1945, that petitioner sought to submit to induction, that he was directed on

[1] On March 17, 1947, the Local Board was advised in conformity with the practice of the Selective Service System that Form 301 could not be withdrawn. Exhibit 7 in petitioner's Immigration File.

July 26, 1946, to report for a pre-induction physical (Exhibit 8 in the Immigration File), that he was declared physically fit (Exhibit 9 in the Immigration File), but that his efforts to enlist in the United States Army were unsuccessful, and, in fact, he was rejected from the Army because of alienage. (Par. 15 of Complaint Admitted By Answer).

The file further reveals that the petitioner applied, pursuant to Selective Service regulations, in 1944 for a certificate that he was a nonresident on June 1[illegible], 1944 (Exhibit 13 in the Immigration File). The draft board advised him that they would make a determination as to his status of resident or non-resident upon receipt of a letter from his consul. On August 11, 1944 (Exhibit 11 in the Immigration File), a determination was made that he was a person residing in the United States.

On February 10, 1953, the Board of Immigration Appeals rejected the contention that the petitioner was a nonresident upon the ground that he was required to file his application with Selective Service prior to May 16, 1942. In addition, the Government in its fourth defense in its answer herein, asserts that the application for a certificate of non-residence was not timely filed in the instant case, and therefore, that the petitioner was, in fact, subject to the Selective Training and Service Act of 1940 (R. 38).

Petitioner contended below that he did not incur the bar of ineligibility for American citizenship for the following reasons:

1. That he was not a person residing in the United States and as such was not subject to the Selective Training and Service Act of 1940.

2. That he was induced to file his claim for draft exemption by mistake.

3. That he subsequently submitted himself for induction and accordingly made a proper withdrawal of his claim to draft exemption.

The District Court rejected the petitioner's contentions, holding that under *Machado* v. *McGrath*, 89 U.S. App. D.C. 70, 193 F. 2d 706 (1951), petitioner's status as a resident was taken as confessed for failure to apply for a certificate of non-residence prior to May 16, 1942, and further that the record conclusively shows that the petitioner claimed draft exemption "freely with full knowledge as to the consequences" (R. 29).

The Court of Appeals affirmed by a divided vote. Judge Bazelon dissenting, observed (R. 46 footnote 3):

> "From all that appears in this record, in passing on the merits of the application the Director of Selective Service based his determination that appellant was 'residing in the United States' solely upon the appellant's lawful status as a temporary student visitor. On that basis, I think the Supreme Court's decision in *McGrath v. Kristensen*, 340 U.S. 162 (1950), especially the concurring opinion of Mr. Justice Jackson, requires us to hold that determination erroneous as a matter of law. Such an error, in my view, does not bind the Immigration Service. *Ex parte Ghosh*, 58 F. Supp. 851 (S.D. Cal. 1944)."

Reasons for Granting the Writ

1. The decision below is in conflict with *Moser* v. *United States*, 341 U.S. 41 (1951). There this Court found that the petitioner was understandably lulled into a misconception of the legal consequences of applying for draft exemption by the Government. It stated at page 47:

> "Petitioner did not knowingly and intentionally waive his rights of citizenship. In fact because of the misleading circumstances of this case, he never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the

> case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness."

The *Moser* case sets forth a broad principle of law and fair play applicable to dealings with our Government. Where an individual has been misled by Government officials, "the government should always be a gentleman" and not take advantage of its error. The doctrine has been frequently applied in tax and citizenship cases. *Strockstrom* v. *Commissioner,* 190 F. 2d 283 (C.A.D.C. 1951); *Staten Island Hygenia Ice and Cold Storage Co.* v. *United States,* 85 F. 2d 68 (C.A. 2, 1936); *Uyeno* v. *Acheson,* 96 F. Supp. 510 (W. D. Wash., 1951); *Di Girolamo* v. *Acheson,* 101 F. Supp. 380-382 (Dist. of Col., 1951). *Moser* v. *United States,* 341 U.S. 41 (1951); *Hong* v. *Acheson,* 110 F. Supp. 60, (N.D. Calif. 1953); *Gay* v. *Brownell,* 120 F. Supp. 319 (*D. C. Puerto Rico,* 1954); *Rueff* v. *Brownell,* 116 F. Supp. 298 (D.C. N.J. 1953).

The Court below, however, declined to apply this rule of fair play in the instant case.

The testimony and documentary evidence herein make it clear that petitioner claimed draft exemption:

> (a) At the suggestion of and through the error of the chief clerk of his draft board to whom he properly looked for advice.
>
> (b) At a time when his induction into the armed forces was not imminent.
>
> (c) Without any request on his part for Form DSS 301.
>
> (d) Without realization that he would be permanently barred from citizenship.

In view of the error of the draft board clerk, it is neither fair nor just to bar petitioner from American citizenship,

and in accordance with the cases noted above, it should be ruled that he is eligible for American citizenship.

2. The decision below is in conflict with *McGrath* v. *Kristensen*, 340 U.S. 162 (1950), as Judge Bazelon found, with *Benzian* v. *Godwin*, 168 F. 2d 952 (C.A. 2, 1948), and raises an important question of administrative law. In the *Kristensen* case, this Court ruled that an alien could only be barred from citizenship under the 1940 Selective Service Act where he was residing in the United States at the time of his draft exemption claim.

Petitioner came to the United States lawfully as a student on September 9, 1939, and as Exhibit 12 in his Immigration File reveals and as respondent admits in paragraph 4 of his third defense (R. 7), petitioner remained in a lawful student status until July 21, 1945. He claimed draft exemption as a neutral alien on December 31, 1942, when he was still in such status.

On June 13, 1944, petitioner applied to his draft board for a certificate of nonresidence, and this application was denied on its merits on August 11, 1944. (Exhibits 11 and 13 in petitioner's immigration file.) Although the Selective Service System considered that petitioner had filed his application in a timely manner, both the Board of Immigration Appeals and the Court below, applying the *dicta* of *Machado* v. *McGrath*, 89 U.S. App. D.C. 70, 193 F. 2d 706 (1951), *cert. denied* 342 U.S. 948, held that by reason of his failure to claim non-residence within 90 days or before May 16, 1942, his status as a resident was taken as confessed.

(a) The comments of the Selective Service System in *Problems of Selective Service* (1952), Text page 107, are to the contrary. They state:

> "In all cases where an application was not filed within the 90 days, the director of Selective Service determined whether or not the alien was residing in the United States."

The regulations, 32 C.F.R. 611.29(b) in force after September 14, 1942 (*Problems of Selective Service*, 1952, Appendices A-C p. 40) state:

> "Notwithstanding any other provisions of these regulations, whenever the Director of Selective Service is satisfied that a non-declarant alien is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Service and Training Act of 1940, as amended, he may issue or authorize the issuance of an Alien's Certificate of Nonresidence, (Form 303) to such non-declarant alien."

Thus it appears that there was no time limitation upon the consideration of an application for certificate of nonresidence by the Director of the Selective Service System.

(b) Finally, and most important, is the fact that the Selective Service System did not believe that there was any jurisdictional defect or any untimely filing of the application for the certificate of nonresidence. This issue was erroneously raised for the first time by the Board of Immigration Appeals in its decision of February 10, 1953 (R. 32).

Benzian v. *Godwin*, 168 F. 2d 952 (C.A. 2, 1948), *cert. denied* 335 U.S. 886 is particularly in point. Benzian claimed draft exemption as a neutral alien in 1943. In 1946 he applied for a certificate of nonresidence and this application was denied in 1947. The Court of Appeals noted at page 956:

> The determination cannot have been made on the basis of his failure to file Form 302 [application for certificate of nonresidence] within the prescribed time limit, for when the determination was made, the three month requirement had been removed. We think it not material that the determination was made after appellant had filed Form 301, for appellant's status as a resident or nonresident was unaffected by the filing of that form.

Can one administrative agency (the Board of Immigration Appeals) overrule the Selective Service System on an issue particularly within the latter's competence, i. e., the issue of timely filing of a Selective Service non-residence application? This case presents a conflict with *McGrath* v. *Kristensen*, 340 U.S. 162 (1950); *Benzian* v. *Godwin*, *supra*, and the important administrative law issue as to the controlling weight to be given agency determinations where they are in disagreement.

3. We have noted the error of the draft board clerk in entrapping petitioner into claiming draft exemption as a neutral. Petitioner has been caught in a maelstrom of bureaucratic errors. The Attorney General erroneously ruled that all persons physically present in the United States were residing here for the purposes of the Selective Service Act of 1940, 39 *Op. Atty. Gen.* 504, *McGrath* v. *Kristensen*, 340 U.S. 162 (1950). Based on this erroneous ruling, Selective Service regarded petitioner, a temporary visitor under our immigration laws and so recognized on December 31, 1942, by the Immigration Service and the State Department, as a resident. The Selective Service determination of petitioner's residence was not made upon the basis of any standards, but in the absolute, unbridled discretion of that agency. Thus in *Problems of Selective Service*, 1952, Text, pp. 106, 107, 125, 128-129, the Selective Service System states:

> "In a way, however, the determination of residence by the Director was somewhat "fictional" since on October 11, 1940, the Attorney General had rendered an opinion (39 Op. Atty. Gen. 504) * * * It is true that this Attorney General later in the role of an Associate Justice of the United States Supreme Court designated the opinion as incorrect (*McGrath* v. *Kristensen*, 340 U.S. 162, 71 S. Ct. 224). In the meantime, however, it had created difficulties for Selective Service.
>
> * * * * *

> Resort to the courts was sometimes necessary for a determination of residence, *due to the lack of statutory or administrative standards relating to its definition.* (Italics supplied).
>
> Ultimate authority for the determination of residence needs to repose in the Director, however, even though this might entail the exercise of rather arbitrary actions in some cases. Section 611.29 of the 1940-47 regulations conferred such authority on the Director."

In *Ex Parte Ghosh,* 58 F. Supp. 851 (S. D. Calif. 1944), appeal dismissed, 148 F. 2d 822, the Court said:

> "I do not think the rules and regulations provide any norm or standard by which the local board can determine whether or not a person is in one of the other categories mentioned in Section 5 of the Act, 50 U.S.C.A. Appendix § 305; nor do they provide a norm or standard by which if certain facts are present it can determine whether or not a person is or is not residing in the United States as the term is used in Sections 2 and 3 of the Act, 50 U.S.C. Appendix §§ 302, 303. • • •
>
> I think he (the Director of Selective Service) has simply, under the regulations as they now stand, reserved to himself the power personally to determine—by what rules, no one would know—this petitioner or any other person who sought a certificate of exemption [as a non-resident]—whether he was or was not entitled to it.
>
> That, in my judgment, is what is described in the decisions as arbitrary and capricious, and I would say lack of due process and a lack of rule of reason."

Petitioner filed an application for a determination of residence with the Selective Service System in 1944 which was denied upon its merits. As Judge Bazelon observed, and as the Selective Service Regulations specifically authorized

[32 C.F.R. 611.29(b); *Benzian* v. *Godwin*, 168 F. 2d 952 (C.A. 2, 1948)], the late filing of such application was waived (R. 45, footnote 3). Nevertheless, the Board of Immigration Appeals erroneously ruled that petitioner was a resident, subject to the draft, and therefore ineligible for citizenship, not on the basis of the merits, but because his residence must be deemed confessed by reason of the late filing of his residence application before the Selective Service System (R. 34).

Reliance upon the regulations to accomplish a *conclusive presumption of residence*, as the Court below and the Board have done, violates the due process clause of the Fifth Amendment to the Constitution.

In *Manley* v. *Georgia*, 279 U.S. 1 (1928) the Supreme Court held:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. *Bailey* v. *Alabama*, 219 U.S. 219, 223 * * *. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property."

See also: *Mobile, Jackson & Kansas City Railroad Co.* v. *Turnipseed*, 219 U.S. 35 (1910); *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 239, 240 (1925); *Heiner* v. *Donnan*, 285 U.S. 312, 329 (1931); *Adler* v. *Board of Education*, 342 U.S. 485, 496 (1952).

4. On February 25, 1945, Turkey became a co-belligerent. Thereafter petitioner sought to enter our armed forces. On July 26, 1946, he was directed to report for a pre-induction physical examination (Exhibits 5 and 8 in Immigration File), and was declared physically fit (Exhibit 9 in Immigration File). However, his efforts to enlist were unsuccessful and he was rejected because of alienage. (Par. 15 of Complaint admitted by Answer, R. 5, 8).

Petitioner's withdrawal of his claim of draft exemption

was recommended by his draft board (R. 41). Nevertheless, although locus poenitentiae has been recognized in these circumstances by many cases, *In re Siem,* 284 Fed. 868 (affirmed, 299 Fed. 582, C.A. 9, 1924); *In re Bevelacqua* 295 Fed. 862 (D.C. Mass. 1924); *Petition of Ajlouny,* 77 F. Supp. 327 (E.D. Mich. 1948), the Courts below refused to accord such right to petitioner.

By submitting himself to induction petitioner no longer secured the exemption of the Selective Service Act. Therefore, the disabilities incurred by his original filing of a draft exemption claim were removed. He is therefore eligible to citizenship.

Indeed, such was the conclusion of the Selective Service System on November 22, 1946, when they advised the Immigration Service in a letter contained in the Immigration file of *Matter of Josefsson,* File No. 4558054:

> "Where the benefits derived by a neutral alien by the proper filing of D.S.S. Form 301 no longer exist (exemption from training and service), it is our inclination that the penalties incurred by such action (debarment from obtaining United States citizenship) should likewise be removed. This opinion contemplates the situation where a neutral alien, who has filed a D.S.S. Form 301, is later declared a cobelligerent alien, and thus subjected to training and service under the Selectibe Training and Service Act."

Conclusion

In view of the conflict in decisions on these important issues, it is submitted that certiorari should be entertained.

For the reasons set forth above, it is requested that a writ of certiorari issue.

Respectfully submitted,

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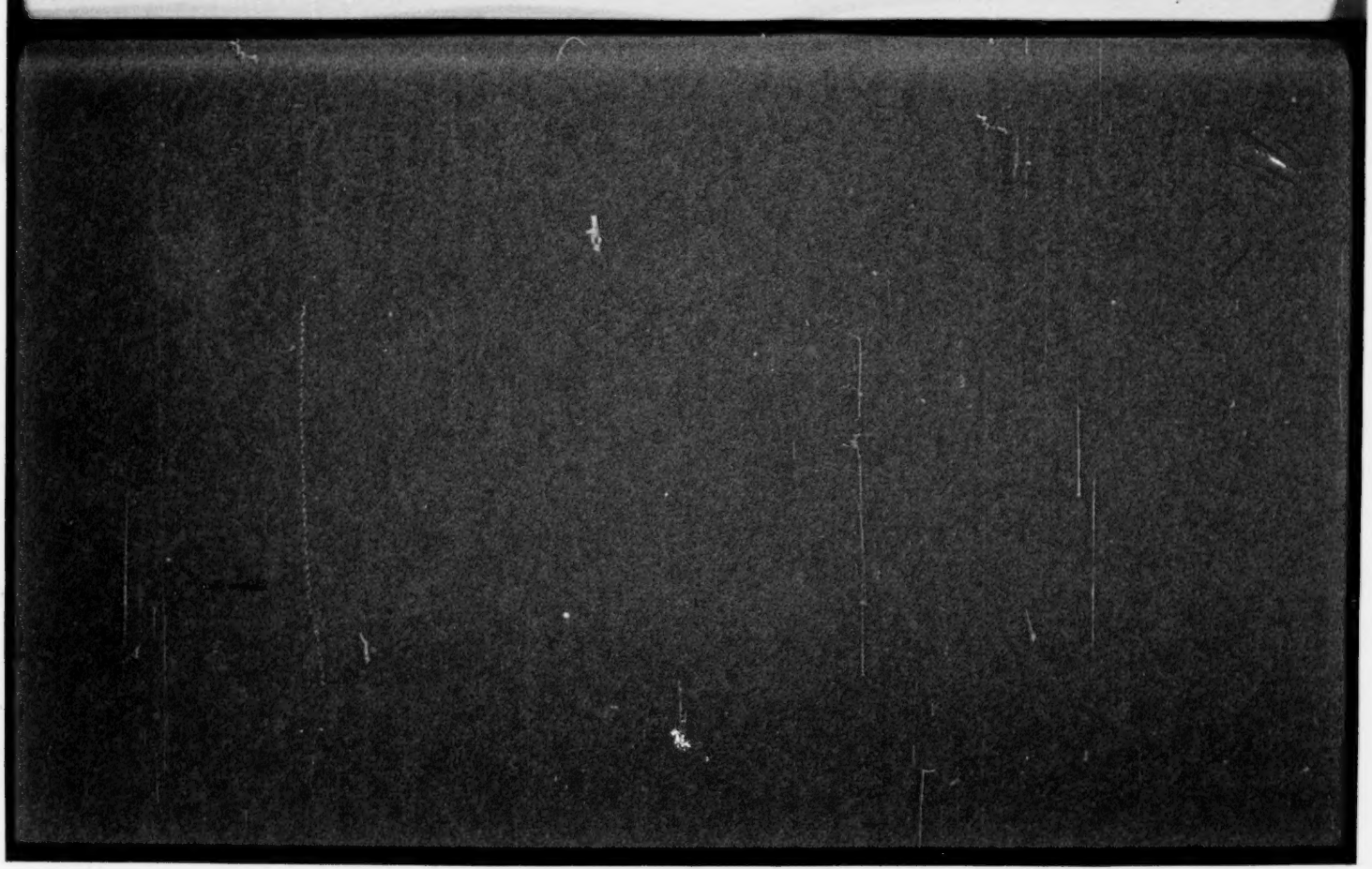

APPENDIX A

Statutes

Section 303(a) of Title 50, Appendix, United States Code, (Section 3a of the Selective Training and Service Act of 1940) pertaining to exemption of neutral aliens from military service, reads in part as follows:

> (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and forty-five, at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States; Provided, That any citizen or subject a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: . . .

Regulations

The following regulations were effective February 7, 1942, 7 Fed. Reg. 855:

> 32 C.F.R. 611.12. *When a nondeclarant alien is residing in the United States.* Every male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States, unless he is in one of the categories specifically excepted by the provisions of 611.13 is a "male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended.
>
> 32 C.F.R. 611.13. *When a nondeclarant alien is not residing in the United States.* (a) A male alien who is now in or hereafter enters the United States who has

not declared his intention to become a citizen of the United States is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended:

* * * * *

(6) If he has entered or hereafter enters the United States in a manner prescribed by its laws and does not remain in the United States after May 16, 1942, or for more than 3 months following the date of his entry, whichever is the later.

(b) When a male alien who has not declared his intention to become a citizen of the United States has entered or hereafter enters the United States in a manner prescribed by its laws and remains in the United States after May 16, 1942, or for more than 3 months following the date of his entry, whichever is the later, he is a "male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended, unless he has filed an Alien's Application for Determination of Residence (Form 302) in the manner provided in 611.21 and such application is either (1) pending or (2) has resulted in a determination that he is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, in either of which events he shall not be considered as a "male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, during the period when such application is pending or during the period covered by the Alien's Certificate of Nonresidence (Form 303) issued to him as a result of the determination that he is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended. (54 Stat. 885; 50 U.S.C., Supp. 301-318, inclusive; E.O. No. 8545, 5 F.R. 3779).

Effective January 17, 1946, the above paragraph 6 was

renumbered and amended to read as follows (*Problems of Selective Service,* 1952, Appendices A-C, pp. 35-36):

> (7) He has, within the time prescribed and in the manner provided in section 611.21, filed with the local board with which he is registered, or if he is not registered, with the local board having jurisdiction over the area in which he is located, an Alien's Application for Determination of Residence (Form 302), together with an Alien's Personal History and Statement (Form 304) and such application is either pending or has resulted in the issuance by the local board of an Alien's Certificate of Nonresidence (Form 303) which has not expired.
>
> 32 C.F.R. 611.21. *What aliens may apply for a determination.* Any nondeclarant alien who has entered or who hereafter enters the United States * * * may file with his local draft board * * * an Alien's Application for Determination of Residence (Form 302); *Provided,* That such application is filed within three months after the date of his entry into the United States or within three months after persons of his age become liable for training and service by law, whichever is the later; *And provided further,* That such application is filed prior to induction * * *[2]

Effective June 27, 1945 (10 F.R. 7906), Section 611.21-1 was added (*Problems of Selective Service,* 1952, Appendices, A-C, p. 37), reading as follows:

> *Application filed after 3 months.* Any alien who has not complied with the provisions of section 611.21 or section 611.26 may file an Alien's Application for Determination of Residence (Form 302) and an Alien's Personal History and Statement (Form 304) with a local board for transmittal to the Director of Selective Service for consideration.
>
> 32 C.F.R. 611.22. *Determination by local board.* (a) As soon as possible after an alien who is entitled to do so files with the local board an Alien's Application for

[2] Originally this section, promulgated in 1942 (7 F.R. 2084) required a claim of non-residence to be filled prior to May 16, 1942 for those here before February 16, 1942. The section was amended to read as noted in the text in 1943 and republished in the same form again in 1945.

> Determination of Residence (Form 302), together with an Alien's Personal History and Statement (Form 304), the local board shall determine whether such alien is "a male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended.

Effective March 16, 1942, as amended on September 14, 1942, 32 C.F.R. 611.29(b) provided as follows (*Problems of Selective Service*, 1952, Appendices A-C, p. 40):

> Notwithstanding any other provisions of these regulations, whenever the Director of Selective Service is satisfied that a non-declarant alien is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, he may issue or authorize the issuance of an Alien's Certificate of Nonresidence (Form 303) to such nondeclarant alien.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12839

MEHMET SABAHITTIN GIZ, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General of the United States, APPELLEE

Appeals from the United States District Court for the District of Columbia

Decided December 13, 1956

Before BAZELON, DANAHER and BASTIAN, Circuit Judges.

BAZELON, *Circuit Judge:* Section 3(a) of the Selective Service Act of 1950, 50 U.S.C. App. § 303(a) (1946), makes all aliens "residing in the United States" liable for military service. It provides, however, that any citizen of a neutral nation may be relieved from service upon application

(Form DSS-301), and that persons thus relieved will thereafter be barred from citizenship. Regulations 611.21 (32 C.F.R. 611.21) promulgated thereunder provided for determination of non-residence upon filing application (Form DSS-302) within three months after date of entry or after becoming liable for service, whichever was later. This was supplemented by 611.21-1 (32 C.F.R. 611.21-1) on June 27, 1945, permitting application to be filed after three months.

In these three cases, appellants, Turkish citizens who were in the United States pursuant to student non-immigration visas under § 4(e) of the Immigration Act of 1924, claimed draft exemption as neutral aliens. Under § 212(a)(22) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(22) (1952), persons ineligible for citizenship are ineligible for permanent entry immigration visas. The Board of Immigration Appeals in deportation proceedings, ruled that appellants were ineligible for citizenship by reason of their claims for draft exemption and ordered their departure. Appellants challenged this administrative action in these declaratory judgment suits. Judgments were allowed against them.[1] These appeals followed.

* * * * *

No. 12839

Appellant Giz entered the United States in 1939 on a student's visa and remained in a lawful student status until July 21, 1945. In 1940 he registered with his local draft board. He claimed draft exemption December 31, 1942. In June, 1944, however, he filed an application for a determination of non-residence. Notwithstanding his failure to file within the time prescribed by the regulations then in effect, the draft board considered the application on its merits before denying it.

My colleagues are of the view that, notwithstanding such consideration, Giz's status, like that of the other two appellants, as an alien "residing in the United States" may be taken as confessed for the purpose of § 3(a) of the Selective Service Act. This view, with

[1] In Nos. 12873 and 13043 by summary judgment; in No. 12839 after trial.

(Footnote 2 of this opinion is omitted in reprinting.)

which I disagree, is fully stated in Judge Danaher's separate opinion herein. For reasons noted in the footnote,[3] I would reverse and remand for further administrative proceedings.

As another ground for avoiding the bar of ineligibility, Giz alleges that he claimed draft exemption under mistake. He says that he signed the claim for exemption at the request of the chief clerk of the draft board and hence did not have the " 'opportunity to make an intelligent election' between being subject to the draft on the one hand, and being exempt but losing the right to become a citizen on the other." *Machado* v. *McGrath*, 90 U.S. App. D.C. at 74, 193 F.2d at 709, citing *Moser* v. *United States*, 341 U.S. 41 (1951). We find no basis in this record for disturbing appellee's adverse factual determination. See *Mannerfrid* v. *United States, supra.* (200 F. 2d 730).

No. 12873 affirmed.
No. 13043 affirmed.

DANAHER, *Circuit Judge*, with whom Circuit Judge Bastian concurs: We concur in Judge Bazelon's opinion as to No. 12873—*Gurcay* v. *Brownell* and No. 13043—*Moran* v. *Brownell*. We agree with Judge Bazelon's disposition of

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[3] Although Giz's application was filed late, it was considered on its merits. Hence the regulations' timely filing requirements must be deemed to have been waived. And this accords with Selective Service policy followed even before the time for filing was extended by supplementation of the regulations in 1945. See *Problems of Selective Service* (1952) Text p. 107 and Appendices A-C p. 40; and 32 C.F.R. 611.29(b).

From all that appears in this record, in passing on the merits of the application the Director of Selective Service based his determination that appellant was "residing in the United States" solely upon his lawful status as a temporary student visitor. On that basis, I think the Supreme Court's decision in *McGrath* v. *Kristensen*, 340 U.S. 162 (1950), especially the concurring opinion of Mr. Justice Jackson, requires us to hold that determination erroneous as a matter of law. Such an error, in my view, does not bind the Immigration Service. *Ex parte Ghosh*, 58 F. Supp. 851 (S.D. Cal. 1944).

But I do not think this concludes the matter. For even as to an alien in the United States on a student's visa, there may be other circumstances showing a purpose to reside here. The Immigration Service should have the opportunity of determining whether such circumstances exist here. To that end I would reverse and remand to the District Court with directions to refer the case back to the appellee for further administrative proceedings.

the claim by Giz that he sought "draft exemption under mistake." As to the other aspects of the question presented in No. 12839—*Giz* v. *Brownell*, we prefer to state our position as will be developed.

Giz, a citizen of Turkey, entered the United States on September 9, 1939, as a student. After studying English in Massachusetts, he entered the University of California as a pre-dental student. In 1940 he registered with the local draft board at Berkeley, California. He was graduated from the University in October 1944 with a degree in dentistry and thereafter took a postgraduate course in dental surgery. His visa expired in July 1945, after he had completed his studies and had concluded his professional examination. He did not seek an extension of his visa nor did he depart from the United States. Instead, he moved to San Diego, California, and opened an office for the practice of dentistry. In 1947 deportation proceedings were instituted because Giz had overstayed his visa. After several hearings, and a determination that Giz should be excluded from admission to the United States, he appealed to the Board of Immigration Appeals. The Board held that Giz was statutorily ineligible for citizenship and, accordingly, ineligible for suspension of deportation. Although he was granted voluntary departure, he filed an action for declaratory relief claiming, notably, that he had not been "residing in" the United States within the meaning of § 3(a) of the Selective Training and Service Act of 1940.[1] After trial and oral argument, Judge McGuire entered findings of fact and conclusions of law and ordered judgment for the defendant. Thereupon, Giz appealed.

The Selective Training and Service Act of 1940 by § 3(a) required the registration of every male citizen of the United States and every other male person "residing in the United States." It provided further that, despite registration, a citizen of a neutral country was to be relieved from liability for service upon his making application for such relief "in accordance with the rules and regulations prescribed by the President." Any such person who filed such an application by statute was thereafter "debarred from becoming a citizen of the United States." The

[1] 54 STAT. 885 (1940), as amended, 55 STAT. 845 (1941), 50 U.S.C. App. 303(a) (1946).

Act did not define who was a male person "residing in" the United States.

The Regulations as promulgated have been found to be valid.[2] Section 611.12[3] prescribed "when a non-declarant alien is residing in the United States." Since Giz had not declared his intention to become a citizen of the United States, pursuant to the statute and to this regulation, without more, he was deemed to be "residing in" the United States[4] unless he fell into an excepted category as provided by § 611.13.

Pursuant to the Regulations,[5] Giz could have been deemed not to be "residing in the United States" if, by May 16, 1942, he had filed an Alien's Application for Determination of Residence on Form 302. But he filed no such application by May 16, 1942. Indeed, not until May 31, 1944, did he file Form 302. Thus, as we are saying concerning Gurcay and Moran, the status of Giz as an alien "residing in the United States" must be taken as confessed for the purposes of § 3(a) of the Selective Training and Service Act and of the Immigration and Nationality Act.[6] But the law and the circumstances determining his status for the purposes of this case do not stop there.

From 1940 on, having registered as he was bound to do, Giz was charged with notice as to the requirements of the law. It was "incumbent upon him to keep informed of any conditions attached to any claim for exemption before he undertook to press one."[7] Yet, ten months after the promulgation of the Regulations, and seven months after his status had already become fixed, he filed, *not* Form 302, but Form 301. Although he was already classified 4-C as a citizen of a neutral country, he asked for complete ex-

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[2] *Mannerfrid* v. *United States*, 200 F. 2d 730, 732 (2d Cir. 1952), *cert. denied*, 345 U.S. 918 (1953); cf. *McGrath* v. *Kristensen*, 340 U.S. 162 (1950), where the Court did not pass on the validity of the regulations set forth at p. 173 note 19, since they were not effective when Kristensen filed his application for relief.

[3] 32 C.F. R. § 611.12.

[4] *Mannerfrid* v. *United States*, *supra* note 2; cf. *Benzian* v. *Godwin*, 168 F. 2d 952 (2d Cir. 1948), *cert. denied*, 335 U.S. 886 (1948), modified in part by *McGrath* v. *Kristensen*, *supra*, note 2.

[5] § 611.13(a)(6).

[6] *Mannerfrid* v. *Brownell*, —— U.S. App. D.C., ——, —— F. 2d —— (D.C. Cir. October 18, 1956).

[7] *Mannerfrid* v. *United States*, *supra* note 2, 200 F. 2d at 732.

emption from military service. On December 31, 1942, he signed and filed with the local draft board his application containing the statement:

> "I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, in accordance with the Act of Congress, approved December 20, 1941. *I understand that the making of this application to be relieved from such liability with debar me from becoming a citizen of the United States.* I have not filed a declaration of intention to become a citizen of the United States." (Emphasis supplied.)

He brought himself squarely within the provision of § 3(a) of the Selective Training and Service Act, and thereby he became "debarred from becoming a citizen of the United States." He not only sought and received the benefits and the protection of life in the United States, he pursued and completed his professional education while tens of thousands of others responded to the nation's wartime needs. But not Giz. It is possible to conclude, irrespective of the Board of Immigration Appeals, that, without regard to any other consideration whatever, he intended to remain safe and secure while carrying out his own purposes. Even when his visa had expired, he moved to a different city and opened an office for the practice of his profession. Indeed, when applying for suspension of deportation in 1950, he claimed he had resided in the United States for more than seven years and was so residing on July 1, 1948. Quite apart from differing connotations of legal definitions of "residing," the continuing purpose of Giz throughout the past seventeen years seems clear enough, and the fact is that he is still here.

But the courts have now been asked to say that he was a non-resident. We are asked to decide that his case differs from those of Gurcay and Moran because, as of May 31, 1944, he filed an application for Determination of Residence, Form 302. We do not understand the reference to a "waiver" in terms of a timely filing. Although Giz had already forfeited his non-resident status, if he had one up to May 16, 1942, just as did Gurcay and Moran, the

Director nonetheless gave Giz the benefit of consideration. Giz actually, by the additional consideration of his case, received more, not less, than was his due. We see no basis here upon which it can be urged that Giz was harmed on that account, or that he was treated any differently than was warranted by the facts and the law. "In all cases where an application was not filed within the 90 days, the Director of Selective Service determined whether or not the alien was 'residing in the United States.' In such connection, he also had the authority to cancel the registration of any nondeclarant alien and to issue or authorize the issuance of an Alien's Certificate of Non-residence (DSS Form 303)."[8] The director affirmed in 1944 what the law had already determined, that Giz had been a resident for the purposes of the Act, and a Certificate of Non-residence was denied.[9] Thereafter, Giz, on July 11, 1944, was classified as a medical student, and he remained deferred throughout the war.

No neutral alien was compelled to serve in our military forces, but when Giz claimed relief from such service because he was a neutral alien, Congress said that he was not to become a citizen of the United States in the future. To us it seems that Giz comes squarely within the interdiction.

The order of the District Court in No. 12839 is

Affirmed.

JUDGMENT—(Filed December 13, 1956)

This cause came on to be heard on the record from the United States District Court for the District of Columbia and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court

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[8] U.S. Selective Service System, *Problems of Selective Service*, Vol. 1, p. 107 (1952).

[9] *Ex parte Ghosh*, 58 F.Supp. 851 (S.D. Cal. 1944), is clearly distinguishable, for Ghosh, a Hindu, was on that account ineligible to become a citizen of the United States. Not being entitled to be either a citizen or a permanent resident, Ghosh would have been in the United States unlawfully unless he was here only temporarily as a visitor; cf. *Estep* v. *United States*, 327 U.S. 114, 121 (1946); and see U.S. Selective Service System, *Problems of Selective Service*, Vol. 2, pp. 134-143 (1952).

appealed from in this cause be, and the same is hereby, affirmed.

Dated: December 13, 1956.

Per Circuit Judge Danaher.

Circuit Judge Bazelon, for the reasons noted in his opinion this day filed herein, would reverse the judgment and remand the case to the District Court with directions to refer the case back to the appellee for further administrative proceedings.

(4089-9)

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	3
Argument	7
Conclusion	11
Appendix	12

CITATIONS

CASES:

Ballester v. *United States*, 220 F. 2d 399, certiorari denied, 350 U.S. 830 8

Benzian v. *Godwin*, 168 F. 2d 952, certiorari denied, 335 U.S. 886 10

Ceballos v. *Shaughnessy*, No. 71, this Term, decided March 11, 1957 ..... 8, 10

Machado v. *McGrath*, 193 F. 2d 706, certiorari denied, 342 U.S. 948 9

Mannerfrid v. *United States*, 200 F. 2d 730, certiorari denied, 345 U.S. 918 9

McGrath v. *Kristensen*, 340 U.S. 162 ..... 7, 8

Moser v. *United States*, 341 U.S. 41 7

Francisco Ballester Pons v. *United States*, 220 F. 2d 399, certirorai denied, 350 U.S. 830 8

STATUTES AND REGULATIONS:

Act of December 20, 1941, 55 Stat. 844 3

Immigration Act of 1924, Sec. 28(c), as amended by the Act of October 29, 1945, 59 Stat. 551, 8 U.S.C. (1946 ed.) 224(c) 15

Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. 1101 *et seq.*:

Section 101(a) (19) 15

315 16

Page

Selective Training and Service Act of 1940, Sec. 3(a), 54 Stat. 885, as amended, 50 U.S.C. App. (1946 ed.) 303(a) 2, 3, 7, 9, 12
Selective Service Regulation 611.13, as amended July 8, 1943 (8 F.R. 9361) 13

Selective Service Regulations:
Section 611.12 (7 F.R. 855) 5, 9, 12
611.13 (7 F.R. 855) 5, 9, 12
611.21 (7 F.R. 2084) 5, 14

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 832

MEHMET SABAHITTEN GIZ, *Petitioner*

v.

HERBERT BROWNELL, JR.,
ATTORNEY GENERAL OF THE UNITED STATES

On Petition For a Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Appeals (Pet. 18-24) are reported at 240 F. 2d 25. The opinion of the District Court appears at pages 57-59 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered December 13, 1956 (Pet. 24-25). The petition for a

writ of certiorari was filed on March 12, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner, a Turkish national, applied for exemption from military service as a neutral alien in December 1942, when regulations of the Selective Service System provided that every male alien then in the country should be deemed to be "residing" here (and thus subject to the draft) if, before May 16, 1942, he failed to file an application to have his "residence" determined. Petitioner had not made such application when he applied for the exemption which was granted to him, but two years later he made an untimely application to be determined a non-resident, which was denied.

The questions are:

1. Whether petitioner signed the Selective Service exemption form, in December 1942, voluntarily and intelligently.

2. Whether, in the circumstances of this case, petitioner had a right to relitigate before the Immigration and Naturalization Service the issue of whether, when he signed the exemption form, he was a "resident" within the meaning of Section 3 (a) of the Selective Training and Service Act of 1940 and thus subject to the draft.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, the pertinent Immigration Acts, and the applicable Selective Service regulations, are set forth in the Appendix, *infra,* pp. 12-16.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals affirming the denial by the District Court of his action for declaratory relief and review of the immigration proceedings finding him subject to deportation and ineligible for suspension of deportation or pre-examination on the ground that he was debarred from citizenship under Section 3(a) of the Selective Training and Service Act of 1940, by virtue of the fact that on December 31, 1942, he sought exemption from liability to military training and service as a resident alien and citizen of a neutral country.

Petitioner, a native and citizen of Turkey, was admitted to the United States on November 9, 1939, as a student (R. 59, 62).[1] On December 16, 1940, he registered for the draft and shortly thereafter was classified IV-C (exempt as a non-declarant alien), since Section 3(a) of the Selective Training and Service Act of 1940 (54 Stat. 885) originally made only those alien residents who had declared their intention to become citizens liable for service. The Act of December 20, 1941 (55 Stat. 844, 845), passed shortly after our entrance into World War II, amended Section 3(a) of the Selective Service Act to make all male persons "residing in the United States" between the ages of twenty and forty-five so liable, with a provision "That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved

[1] The symbol "R" will be used to designate the pagination of the record, and the symbol "Immig." to designate the pagination of the immigration file lodged as an original exhibit with the Court.

from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

On December 31, 1942, petitioner executed D.S.S. Form 301 claiming exemption from service as a resident alien and citizen of the then neutral country of Turkey (Immig. 96; R. 59, 62). This form contained the following statement on its face (Immig. 96; Pet. 23):

> I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, in accordance with the Act of Congress, approved December 20, 1941. *I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States.* I have not filed a declaration of intention to become a citizen of the United States. [Emphasis added.]

Petitioner's explanation of the signing of the form was that, while a sophomore in dental school, he received from the local Selective Service Board a request for his appearance. While at the board, he heard two Turkish boys arguing with the clerk of the board and heard her tell them that if they signed the form they would be relieved. He said, "It sounded to me very reasonable to sign this paper because my program to study was so heavy and by signing that I would not be bothered again and so I signed, by suggestion of the clerk" (see R. 64).

The then current Selective Service regulations provided that every male alien in the United States or entering it thereafter should be deemed to be a "male person residing in the United States" for the purposes of the Selective Service law if, before May 16, 1942 or within three months after his entry, he failed to file an application to have his residence determined.[2] Petitioner had made no such application at the time he filed his application for exemption in December 1942. On his filing of Form 301, petitioner was continued in Class IV-C as a draft-exempt alien (R. 62).

On May 31, 1944, petitioner filed an application for a certificate of non-residence (R. 22, 45-46, 59) which was denied by his local Selective Service Board on June 27, 1944 (R. 59, 62), and on July 11, 1944 he was classified II-A (medical student deferment) (R. 62, 70). On August 25, 1944, petitioner was notified by his local board that the Director of Selective Service had considered his request for non-resident status and had determined that he was " 'a male person residing in the United States' within the meaning of Sections 2 and 3 of the Selective Training and Service Act of 1940" (R. 63).

From the time of his entry in 1939 to 1944, petitioner was a student, completing a course at a junior college,

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[2] Section 611.12, 7 F.R. 855, *infra*, p. 12; Section 611.13, 7 F.R. 855, *infra*, pp. 12-13; Section 611.21, 7 F.R. 2084, *infra*, pp. 14-15. This latter regulation which became effective March 17, 1942, provided that if a non-declarant alien had legally entered the United States prior to February 16, 1942, and desired to have a determination of residence made he must have filed such application on or before May 16, 1942. Petitioner thus had from March 17, 1942 to May 16, 1942, to make such an application but he failed to do so.

and graduating from dental school in October 1944 (Immig. 60), after which he took a postgraduate course in dental surgery (Pet. 21). He took the examination entitling him to practice dentistry in April 1945 (Immig. 60). During this entire period, he had received extensions of his visa until July 21, 1945, beyond which date he remained in the United States illegally without seeking a further extension (R. 62). Nevertheless, he opened an office for the practice of dentistry and was practicing that profession at the time of the immigration proceedings (Immig. 58).

Turkey became a co-belligerent in February 1945, and petitioner was classified 1-A and ordered to report for a preinduction physical on July 26, 1946 (R. 59; Immig. 110). He was subsequently rejected because of alienage (Pet. 12). He made an effort in 1947 to have his D.S.S. Form 301 withdrawn from his Selective Service record, and his local board, in a letter to the State Director of Selective Service dated March 11, 1947, recommended that this be permitted (R. 69-70; Immig. 97). On March 17, 1947, the State Director informed the local board that this was not permissible under the statute or the existing regulations, pointing out also that petitioner, an educated man, was aware of the implications of his signing the form from the specific statement thereon that the signing would debar him from citizenship (Immig. 109).

In 1947, the deportation proceedings were instituted. The Assistant Commissioner and the Board of Immigration Appeals held that petitioner was deportable and was also statutorily ineligible for citizenship because of his application for exemption from service, and, accordingly, was ineligible for suspension of deportation (Immig. 2-9, 17-18).

Although he was granted voluntary departure, petitioner filed an action for declaratory relief in the District Court claiming that he had not been "residing in" in the United States within the meaning of Section 3(a) of the Selective Training and Service Act of 1940 and therefore was not bound by the provisions of the Selective Service form, and of the 1940 Act, debarring him from future citizenship. See *McGrath* v. *Kristensen,* 340 U.S. 162. After trial and oral argument, the district judge entered findings of fact and conclusions of law and ordered judgment for the defendant (R. 59-60). On appeal, the District Court's judgment was affirmed by a majority of the Court of Appeals; Judge Bazelon, dissenting, would have remanded the case for further administrative proceedings on the question of petitioner's residence status (Pet. 18-25).

ARGUMENT

1. Petitioner contends that when, on December 31, 1942, he executed Selective Service Form No. 301, applying for exemption from military service as a resident alien and citizen of a neutral country, he, like the petitioner in *Moser* v. *United States,* 341 U.S. 41, was unaware of the implications of his act, and did so on the suggestion of a clerk at his local draft board. As both the Board of Immigration Appeals and the two courts below have held,[3] this claim has no foundation in this record. Petitioner's own testimony at the immigration hearing shows that, in executing the form, in the midst of World War II, he was primarily interested that he (R: 64) "not be bothered again" by Selective Service demands since they threatened to

[3] On this issue, the Court of Appeals was unanimous (Pet. 20-21).

interrupt his studies (he was then a second-year dental student), and that, after hearing a conversation between the board clerk and two other students who claimed to be citizens of Turkey, a neutral country, he procured the D.S.S. Form 301 and executed it. The record refutes any suggestion that the clerk misrepresented the legal effect of signing the form. According to his own testimony, she merely stated that the form would relieve him from an obligation to serve (R. 64-65).

The form signed by petitioner plainly bore on its face the qualification that one who applied for exemption from military service as a resident alien and citizen of a neutral country would be barred from citizenship (Immig. 96). *Supra*, p. 4. Petitioner, an educated man, who was then a student in a graduate school, clearly was apprised of the consequences of his act and knew what he was doing when he executed the form. There is in this case even less substance to the claim of mistake than in *Ceballos* v. *Shaughnessy*, No. 71, this Term, decided March 11, 1957, where that petitioner claimed that in executing the form he did so "in the belief that he was required to do so to obtain assignment to a Latin American contingent of the United States Army", *Ibid.*, slip op., p. 5, fn. 11. Here, as there, the Board of Immigration Appeals found that petitioner (*ibid.*) "fully understood the legal consequences of his action and that he was not duly influenced by other considerations." And see *Francisco Ballester Pons* v. *United States*, 220 F. 2d 399, 404 (C.A. 1), certiorari denied, 350 U.S. 830.

2. Petitioner erroneously seeks to bring his case within the holding of *McGrath* v. *Kristensen*, 340 U.S.

162, by arguing that, although he executed the D.S.S. Form 301 as a resident alien and citizen of a neutral country, he was in fact a non-resident within the meaning of Section 3(a) of the Selective Service Act (*infra*, p. 12), and therefore unaffected by the citizenship bar which the execution of that form would otherwise impose.

At the time petitioner executed D.S.S. Form 301, there were in effect Selective Service regulations (Sections 611.12 and 611.13, *infra*, pp. 12-13), which ruled that every male alien then in the country, or entering it thereafter, should be deemed to be "residing" here, if, before May 16, 1942, or within three months after his entry, whichever was later, he did not file an application to have his "residence" determined. Petitioner, who executed Form 301 on December 31, 1942, had been eligible between March 17, 1942, and May 16, 1942, to make such an application but had failed to do so. See fn. 2, *supra*, p. 5. He therefore was deemed a "resident" when he executed Form 301 in December 1942, as the courts have expressly held in comparable cases. *Mannerfrid* v. *United States*, 200 F. 2d 730 (C.A. 2), certiorari denied, 345 U.S. 918; *Machado* v. *McGrath*, 193 F. 2d 706, 708 (C.A. D.C.), certiorari denied, 342 U.S. 948. Kristensen, on the other hand, had claimed exemption between February 7 and May 17, 1942, at a time when he still had an opportunity to apply for the determination of his residence, and until that latter date "he was in the same category as the newly arrived non-declarant alien who, under the regulations and the Act, did not become a resident for three months." 340 U.S. at p. 174.

Petitioner contends that, notwithstanding his failure to make a timely request for a ruling on his residence, the question of his status as a resident should now be deemed open because in May 1944 he filed an untimely application for a determination of residence which was considered by the Director of Selective Service.[4] But on that subsequent consideration the Director determined that petitioner was a resident, and did not change his status. This confirming decision on the merits cannot be said to be a waiver of the requirements of timely filing under which petitioner was barred. He was in no way misled or injured by the later consideration.

Moreover, in *Benzian* v. *Godwin*, 168 F. 2d 952 (C.A. 2), certiorari denied, 335 U.S. 886, the case upon which petitioner particularly relies (Pet. 9), the court held that such a determination by the Director of Selective Service, if it had basis in fact, was not subject to review by the courts. Here, the fact that the Director "affirmed in 1944 what the law had already determined, that Giz had been a resident for the purposes of the Act" (Pet. 24), and denied him a Certificate of Non-Residence, does not demand relitigation of the issue of his 1942 residence in further immigration proceedings, eighteen years after his entry into this country, and over fourteen years after execution of the Selective Service form. The facts stated above (*supra*, pp. 3-6) and in Judge Danaher's opinion in the Court of Appeals (Pet. 20-24) show that there was

[4] Judge Bazelon agreed with petitioner on this point (Pet. 20).

a clear basis in fact for the Director's decision as to residence.[5]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

APRIL 1957.

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[5] Petitioner's attempt to enlist in 1946 after he had been placed in Class 1-A, following Turkey's co-belligerency, did not alter the effect of his claim to exemption as a neutral alien. *Ceballos* v. *Shaughnessy*, No. 71, this Term, decided March 11, 1957.

APPENDIX

Section 3 (a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U.S.C. App. (1946 ed.) 303 (a), provided:

> Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and forty-five * * * shall be liable for training and service in the land and naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *

Selective Service regulations in force in December 1942 provided:

> § 611.12 *When a nondeclarant alien is residing in the United States.* Every male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United State, unless he is in one of the categories specifically excepted by the provisions of § 611.13, is "a male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended. [7 F.R. 855]
>
> § 611.13 *When a nondeclarant alien is not residing in the United States.* (a) A male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States is not "a male person residing in the United States" within the meaning of

section 2 or section 3 of the Selective Training and Service Act of 1940, as amended:

* * *

(b) When a male alien who has not declared his intention to become a citizen of the United States has entered or hereafter enters the United States in a manner prescribed by its laws and remains in the United States after May 16, 1942, or for more than 3 months following the date of his entry, whichever is the later, he is "a male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended, unless he has filed an Alien's Application for Determination of Residence (Form 302) in the manner provided in § 611.21 and such application is either (1) pending or (2) has resulted in a determination that he is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, in either of which events he shall not be considered as "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, during the period when such application is pending or during the period covered by the Alien's Certificate of Nonresidence (Form 303) issued to him as a result of the determination that he is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended.[6] [7 F.R. 855]

§ 611.21 *What aliens may apply for a determination.* (a) Within the time specified in para-

[6] An amendment to Selective Service Regulation 611.13 which became effective July 8, 1943, provided in pertinent part (8 F.R. 9361):

§ 611.13 *When a nondeclarant alien is not residing in the United States.* (a) A male alien who is now in or hereafter enters the United States who has not declared his intention

graph (b) of this section, a nondeclarant alien who has entered or hereafter enters the United States in a manner prescribed by its laws may file with his local board (if he is registered) or with the local board where he is at the time located (if he is not registered) an Alien's Application for Determination of Residence (Form 302), requesting that the local board determine whether he is "a male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended. An Alien's Personal History and Statement (Form 304) must be filed with such application.

(b) An Alien's Application for Determination of Residence (Form 302) must be filed within the following time:

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to become a citizen of the United States is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended; provided he has in his personal possession an official document issued pursuant to authorization of or described by the Director of Selective Service which identifies him as a person not required to present himself for and submit to registration and provided:

• • •

(7) He has, within the time prescribed and in the manner provided in § 611.21, filed with the local board with which he is registered, or if he is not registered, with the local board having jurisdiction over the area in which he is located, an Alien's Application for Determination of Residence (Form 302), together with an Alien's Personal History and Statement (Form 304), and such application is either pending or has resulted in the issuance by the local board of an Alien's Certificate of Nonresidence (Form 303) which has not expired; • • •.

• • •

(1) If a nondeclarant alien has entered the United States prior to February 16, 1942, in a manner prescribed by the laws of the United States and desires to have a determination made under the provisions of paragraph (a) of this section, he must file such application on or before May 16, 1942; or

(2) If a nondeclarant alien enters the United States on or after February 16, 1942, in a manner prescribed by the laws of the United States and desires to have a determination made under the provisions of paragraph (a) of this section, he must file such application within 3 months after the date of his entrance into the United States. [7 F.R. 2084].

Section 28 (c) of the Immigration Act of 1924, as amended by the Act of October 29, 1945, 59 Stat. 551, 8 U.S.C. (1946 ed.) 224 (c) provided:

The term "ineligible to citizenship", when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under * * * section 3 (a) of the Selective Training and Service Act of 1940, as amended (55 Stat. 845; U.S.C., title 50, App. Supp. III), section 303 (a), or under any law amendatory of, supplementary to, or in substitution for, any such sections; * * *.

The Immigration and Nationality Act of 1952, Sections 101 (a) (19) and 315, 66 Stat. 169, 242, 8 U.S.C. 1101 (a) (19), 1426, provide:

[§ 101 (a)] (19). The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3 (a) of the Selective Train-

ing and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4 (a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act * * *.

* * *

[§ 315] (a). Notwithstanding the provisions of section 405 (b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.

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